

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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JEFFREY R. BECKETT,

Plaintiff,

v.

BRINX RESOURCES, LTD., a Nevada
corporation; KENNETH A. CABIANCA, an
individual; and GEORGIA KNIGHT, an
individual,

Defendants.

3:13-CV-00342-LRH-WGC

ORDER

Before the Court is Plaintiff Jeffrey R. Beckett's ("Beckett") Motion for Leave to File a Sur-Reply to Defendant Brinx Resources, Ltd.'s ("Brinx") Motion to Dismiss. Doc. #30.¹ Brinx filed a Response (Doc. #32), to which Beckett replied (Doc. #34).

I. Factual Background

On August 28, 2013, Beckett filed a First Amended Complaint ("FAC"), alleging, among other things, violations of Section 10(b) and Rule 10b-5 of the 1934 Securities Act, 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. On September 11, 2013, Brinx filed a Motion to Dismiss for failure to state a claim upon which relief can be granted. Doc. #20. Beckett filed a Response (Doc. #25), to which Brinx replied (Doc. #27). Thereafter, Beckett filed the present Motion for Leave to

¹ Refers to the Court's docket number.

1 File a Sur-Reply. Doc. #30. Beckett argues that Brinx' Reply raises new matters beyond the scope
2 of its Motion to Dismiss. *See generally id.*

3 **II. Legal Standard**

4 Local Rule 7-2(a)(c) provides for a motion, a response, and a reply. No such provision
5 exists for filing a sur-reply. Thus, a party must obtain leave from the Court before filing a sur-
6 reply. Sur-replies "are highly disfavored, as they usually are a strategic effort by the nonmovant to
7 have the last word on a matter." *Avery v. Barsky*, 3:12-CV-00652-MMD, 2013 WL 1663612, at *2
8 (D. Nev. Apr. 17, 2013) (quoting *Lacher v. W.*, 147 F. Supp. 2d 538, 539 (N.D. Tex. 2001)). On
9 the other hand, it is improper for a party to raise a new argument in a reply brief because the
10 opposing party is not afforded an opportunity to respond. *See Salem Vegas, L.P. v. Guanci*, No.
11 2:12-CV-01892-GMN, 2013 WL 5493126, at *3 (D. Nev. Sept. 30, 2013); *see also Castarphen v.*
12 *Milsner*, 594 F. Supp. 2d 1201, 1204 n.1 (D. Nev. 2009). Where the moving party presents new
13 matters for the first time in a reply brief, the Court may either refuse to consider the new matters or
14 allow the opposing party an opportunity to respond. *See Zamani v. Carnes*, 491 F.3d 990, 997 (9th
15 Cir. 2007) (citing *Koerner v. Grigas*, 328 F.3d 1039, 1048 (9th Cir. 2003) ("[t]he district court
16 need not consider arguments raised for the first time in a reply brief"); *see also Avery*, 2013 WL
17 1663612, at *2-3 (the non-movant may obtain leave to file a sur-reply to address new matters raised
18 in the moving party's reply). When permitted, a sur-reply may "*only [] address new matters raised*
19 *in a reply to which a party would otherwise be unable to respond.*" *Kanvick v. City of Reno*, No.
20 3:06-CV-00058, 2008 WL 873085, at *1 n.1 (D. Nev. March 27, 2008) (emphasis in original).

21 **III. Discussion**

22 Here, the Court finds that it was improper for Brinx, as the moving party, to "shift gears" by
23 introducing new legal argument in its Reply. By Brinx' own admission, "the 'standing' argument
24 and the reference to the '*Birnbaum* Rule' in the Brinx Reply[, to which Beckett objects,] address
25 the most basic of the requirements for pleading a violation of Section 10(b) and Rule 10b-5 that
26 one must be either a purchaser or a seller of securities in connection with the alleged fraud." Doc.

1 #32, p. 4. As such, it was incumbent upon Brinx to address these arguments in its Motion to
 2 Dismiss. Instead, Brinx merely offered that “[t]he FAC fails to allege any purchase or sale of a
 3 security by Plaintiff” without providing any explanation or legal argument. *See* Doc. #20, p. 7.
 4 Subsequently, at a time when Beckett no longer had an opportunity to respond, Brinx offered three
 5 (3) full pages of explanation and legal argument to support its earlier assertion. *See* Doc. #27, pp.
 6 3-5. In this regard, the Court finds Brinx’ Reply to be improper.

7 Moreover, this is not a circumstance in which new matters raised in Beckett’s Response
 8 were unforeseeable at the time Brinx filed its Motion to Dismiss. *See Mitchell v. HFS N. Am., Inc.*,
 9 2:09-CV-02411-GEB, 2011 WL 2961468, at *3 (E.D. Cal. July 20, 2011) (quoting *Litton Indus.*,
 10 *Inc. v. Lehman Bros. Kuhn Loeb Inc.*, 767 F. Supp. 1220, 1235 (S.D.N.Y. 1991), *rev’d on other*
 11 *grounds*, 967 F.2d 742 (2d Cir. 1992)) (stating that “reply papers may properly address new
 12 material issues raised in the opposition papers so as to avoid giving unfair advantage to the
 13 answering party who took it upon himself to argue those previously unforeseen issues”). Contrary to
 14 Brinx’ assertion that “[Beckett] explained, for the first time, that the alleged securities fraud
 15 consisted of Brinx’ sale to Defendant KENNETH A. CABIANCA (“Cabianca”) of 500,001 shares
 16 of Series A Preferred Stock of Brinx, for inadequate consideration” (Doc. #32, p. 2), Beckett
 17 clearly alleges this fact in paragraphs 28 and 37 of the FAC. *See* Doc. #17, ¶28 (“According to
 18 public information provided to the Securities and Exchange Commission (“SEC”), without
 19 adequate consideration and in violation of fiduciary and other obligations owed to Beckett, on
 20 February 10, 2012, Defendant Cabianca caused Brinx to issue 500,001 shares of ‘Series A
 21 Preferred Stock’ at par value to Cabianca;” *see also* Doc. #17, ¶37 (“Cabianca’s actions in this
 22 regard include but are not limited to: (i) granting himself Series A Preferred stock in Brinx in 2012
 23 without adequate factual or legal basis or fair consideration of any type . . .”). Brinx admits as
 24 much in its Reply brief. *See* Doc. #27, pp. 2-3 (citing the same alleged facts and citing the FAC).

25 Notwithstanding this misstep, the Court finds Brinx’ standing argument and reference to the
 26 *Birnbaum* Rule germane to the Court’s evaluation of Brinx’ pending Motion to Dismiss.


1 Accordingly, the Court shall grant Beckett's Motion for Leave to File a Sur-Reply in order to
2 ensure that he has a full and fair opportunity to respond to Brinx' Motion to Dismiss and the
3 arguments subsequently set forth in Brinx' Reply.

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5 IT IS THEREFORE ORDERED that Beckett's Motion for Leave to File a Sur-Reply (Doc.
6 #30) is GRANTED.

7 IT IS FURTHER ORDERED that Beckett shall file a brief sur-reply to Brinx's Motion to
8 Dismiss (Doc. #20) of not more than ten (10) pages, addressing *only* those matters raised for the
9 first time in Brinx's Reply (Doc. #27), within fifteen (15) days of entry of this Order.

10 IT IS SO ORDERED.

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12 DATED this 14th day of November, 2013.

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14 LARRY R. HICKS
15 UNITED STATES DISTRICT JUDGE
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